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JOHN F. DAVIS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] #10

A. L. DUTTON, Warden, Georgia State Prison, Reidsville, Georgia,

Appellant,

vs.

ALEX S. EVANS,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO AFFIRM

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Comes now Alex S. Evans, Appellee, and files this his Motion to Affirm the judgment from which this appeal is prosecuted and as grounds therefor, respectfully shows:

1.

The judgment below, rendered by the United States Court of Appeals, insofar as it relates to the questions presented by this appeal, is correct and it should be affirmed.

2.

In view of prior rulings of this Court, it is manifest that, in view of the settled law, the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

3.

This Court has already decided the issues presented here contrary to the contentions urged by Appellant by its decisions in *Pointer* v. *Texas*, 380 U.S. 400; *Douglas* v. *Alabama*, 380 U.S. 415; *Brookhart* v. *Janis*, 384 U.S. 1; *Bruton* v. *United States*, ... U.S. ....., 20 L. Ed. 2d 476; *Roberts* v. *Russell*, ... U.S. ....., 88 Sp. Ct. 1921; and in subsequent decisions following these authorities. See also, *Flores* v. *United States*, 5 Cir., 379 F. 2d 905.

4.

The decisions of this Court cited above are controlling as to all issues sought to be presented by this appeal. Accordingly, based upon these authorities, the judgment below should be affirmed.

WHEREFORE, Appellee moves the Court, for the reasons stated, to affirm the judgment from which Appellant prosecutes his appeal and, in the alternative, to dismiss the same.

Respectfully submitted,

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN SUPPORT OF MOTION TO AFFIRM

To place in context the ruling of which Appellant complains, Appellee was on trial for the offense of murder. He was jointly indicted with Williams, who had already been tried and sentenced to death. The witness Shaw was permitted to testify that a few weeks earlier, Williams, who, like Shaw was at the time a federal prisoner, had been taken to Gwinnett County for arraignment. Shaw inquired of Williams as to how he had made

out at the arraignment. Williams replied, "If it hadn't been for that dirty son-of-a-bitch, Alex Evans, we wouldn't be in this now." Proper and timely objection having been made to such evidence, the Court of Appeals properly held that this particular hearsay evidence denied Appellee his Sixth Amendment right to confrontation.

In making this ruling, the Court of Appeals held that under the facts of this case, as construed by the Supreme Court of Georgia, Georgia Code Section 38-306 is repugnant to the Sixth Amendment. That code section provides:

> "After the fact of conspiracy shall be proved, the declarations of any one of the conspirators during the pendency of the criminal project shall be admissible against all."

While Appellant has presented his argument under the form of four questions presented, in reality only two questions present themselves. The first is whether Appellee was denied constitutional confrontation. The second is whether the denial of such confrontation was harmful to Appellee. We will address ourselves to the latter question first.

HARMLESS ERROR?

There is no need to speculate as to whether the error was harmful. The right granted to an accused by the Sixth Amendment to confront the witnesses against him includes the right of cross-examination and is made obligatory upon the states by the Fourteenth Amendment. *Pointer* v. *Texas,* 380 U.S. 400. *Where there has been a denial of such right, prejudice to the accused is presumed. Brookhart* v. *Janis,* 384 U.S. 1. In view of this recent holding, it would appear to be unnecessary to say more

on the subject; however, it is not amiss to make other supporting observations.

Before a federal constitutional error can be held harmless, "the Court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18. A review of the record in this case, despite Appellant's assertion to the contrary, will disclose that the conviction is based almost solely upon the uncorroborated testimony of an accomplice who had been granted *total immunity* from prosecution in three capital offenses confessed to by him, plus assistance in securing his parole release from federal authorities on an unrelated charge. Such corroboration as is shown by the evidence relates to time, place and event, not toward connecting Appellee with the offense.

In this situation, over most strenuous objection by Appellee,[1] the State insisted that the testimony of Shaw was admissible. This arose under circumstances where the testimony was anticipated, as Williams had aready been tried. Thus, at the time the constitutional question was raised, Shaw, who had been brought to court for the express purpose of giving this testimony, had not already testified. The constitutional objection having been raised, had the State at that time considered the evidence "far less than the proverbial drop in the bucket," and non-

1. In footnote 3, page 9 of his brief, Appellant states that the objection related only to the scope of Shaw's testimony, that is, "Shaw's being allowed to testify as to his audio as well as his visual perception." We fail to grasp the connotation; however, only the conversation was at issue. Other than to say that he saw and talked to Williams, Shaw offered no testimony as to his visual perception. The objection (T. 142-144), included: ". . . and to permit this witness to testify as to what somebody else told him would be in substance to permit the testimony of another witness . . . to testify through this man's lips and to deny the defendant the right of confrontation guaranteed by . . . the Constitution of the United States, Sixth Amendment . . .".

harmful and nonprejudicial to Appellee, as it now contends, surely it would have withdrawn the witness.

The testimony of Shaw, in effect, constituted an accusation by Williams, who did not confront Appellee, that Appellee was guilty of the murders. It was certainly the intention of the State that it be so construed and understood. From the manner in which it was presented, there can be no other construction. In no event can it be said that the evidence was harmless beyond a reasonable doubt.

CONFRONTATION

There can no longer be any question but that an accused in a criminal case, save in exceptional circumstances, is entitled to be confronted by his accusers and to exercise his right of cross-examination. *Pointer* v. *Texas,* 380 U.S. 400; *Douglas* v. *Alabama,* 380 U.S. 415; *Brookhart* v. *Janis,* 384 U.S. 1; *Bruton* v. *United States,* ..... U.S. ..... (May 1968); *Roberts* v. *Russell,* ..... U.S. ..... (June 1968); and *Flores* v. *United States,* 5 Cir., 379 F.2d 905. The cited authorities and those decided under their teaching advise that these rights are inalienable and that they may be neither eroded nor emasculated by indirection or subtlety.

The Georgia statute in question, Georgia Code Section 38-306, as construed by the Supreme Court of Georgia and applied in this case, has the effect of infringing these rights. It would probably serve no useful purpose here to give a detailed discussion of the history and development of the criminal conspiracy law of Georgia, but perhaps it would be enlightening to aver to some of its characteristics as it existed at the time of the trial. There was no general "conspiracy" statute at that time. A conspiracy could be proved, though not alleged in the in-

dictment. *Dixon* v. *State*, 116 Ga. 186(8), 42 S.E. 357; *Whitaker* v. *State*, 159 Ga. 787(5), 127 S.E. 106. The common-law of conspiracy did not exist in Georgia. In effect proof of a conspiracy was in reality a rule of evidence and a means of proving the accomplishment of the criminal act. *Bishop* v. *State*, 118 Ga. 799(4), 45 S.E. 614; *Nobles* v. *State*, 98 Ga. 73, 26 S.E. 64.

In this situation, the statutory provision in question, developed from decisional law and later codified, appears. As previously stated, it provides that, "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all. "It is to be noted that in context there is no requirement that such declaration be in *furtherance* of the conspiracy. At the same time, by statute, the Georgia Code Section 38-414, provides:

> "The confession of one joint offender or conspirator, made after the enterprise is ended, shall be admissible only against himself."

However, the latter rule is unavailing, as the Supreme Court of Georgia has consistently held, as it did in Appellee's case, *Evans* v. *State*, 222 Ga. 392, 402, 150 S.E. 2d 240, that a conspiracy, by its nature, includes as a part thereof an agreement to conceal the fact that a crime has been committed and the identity of the perpetrators of the offense. *Chatterton* v. *State*, 221 Ga. 424-(5), 144 S.E. 2d 726. Thus, under the statutory law, as applied by the Supreme Court of Georgia, incidentally, contrary to *Grunenwald* v. *United States*, 353 U.S. 391, until the conspirators are tried and convicted, the conspiracy is deemed to continue and any declaration of one conspirator is admissible against the other, regardless of

whether such declaration is in furtherance of the conspiracy or not. *Evans* v. *State*, supra. For example, under the rulings of the Supreme Court of Georgia, which it followed in the present case, in *Darden* v. *State*, 172 Ga. 590, 158 S.E. 414, a confession made by a co-defendant not on trial, implicating the defendant on trial, although not made in his presence, was nevertheless held admissible against him. The court, after quoting the applicable code section, stated:

> "Under the evidence in the case the jury was authorized to find that there was a conspiracy entered into by the three defendants, who were jointly indicted, to kill (the deceased), and the statements admitted into evidence were declarations of one of the conspirators during the pendency of the criminal project."

It is observed that in earlier cases the Supreme Court of Georgia construed the statute differently, in that it held that declarations of a co-conspirator, to be admissible against one on trial, must not only have been made during the pendency of the conspiracy, but also must have been made *in furtherance of its object*. *Wall* v. *State*, 153 Ga. 309, 112 S.E. 142 (1922). This rule has long since been abandoned, although it is consistent with the federal rule followed ever since *Logan* v. *United States*, 144 U.S. 263, 309.[2] There can be no contention and none has been made by Appellant that the statement attributed to Williams, the co-defendant not on trial, was in any remote way in furtherance of the conspiracy contended for by the State. As the Court of Appeals observed in foot-

2. "Doubtless in all cases of conspiracy the act of one conspirator *in the prosecution of the enterprise* is considered the act of all, and is evidence against all. *United States* v. *Gooding*, 25 U.S. 12, 12 Wheat. 400, 409. But only those acts and declarations are admissible under this rule, which are done and made while the conspiracy is pending, and in furtherance of its object. (Emphasis supplied)

note 22 of its opinion, quoting from *Fiswick* v. *United States*, 329 U.S. 211, 217, a "confession or admission of one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it."

In his brief, at page 19, Appellant concedes that in order for a declaration, such as that with which we are concerned, to be constitutionally admissible under the facts of this case, "It must relate to the conspiracy or acts done in furtherance of the conspiracy." This statement is then followed by the citation of and quotation from the opinion of a District Court *civil* case. This isolated lower Court opinion in a civil case could hardly be said to support any logical contention that the Williams' declaration was, or could be held to be, an utterance in furtherance of the conspiracy here involved. This is particularly true in view of *Logan* v. *United States*, supra; *Pinkerton* v. *United States*, 328 U.S. 640, 646; *Fiswick* v. *United States*, supra; *Brown* v. *United States*, 150 U.S. 93. See cases cited and discussion in *Gambino* v. *United States*, 3 Cir., 108 F. 2d 140.

Appellant has devoted a great portion of his argument to the proposition that involved here is nothing more than a deviation or ramification of the "hearsay rule." While the argument and suggestions following so freely therefrom to some extent tend to obfuscate the real and decisive issue, a denial of confrontation is none the less so because it is the result of hearsay evidence. This Court, in the cases cited hereinbefore, i.e., *Pointer*, *Douglas*, *Brookhart*, *Bruton* and *Roberts*, has decided this issue. The present appeal presents nothing novel nor suggestive that those decisions of this Court should be reviewed or overruled. On the basis of them, the judgment of the Court of Appeals should be affirmed.

We could write more at length, but feel that what we have said, together with the astute and well-reasoned opinion of the Court of Appeals, appearing in the record and printed as the appendix to Appellant's brief, to which we refer this Court for further exposition and convincing logic, suffice to obviate further labors.

In responding to Appellant's brief, we have refrained from engaging in kind with the somewhat vitriolic and sarcastic attack upon the opinion of the Court of Appeals, as we feel such attack is without jurisdiction, but merely demonstrates overzealousness on the part of counsel.

CONCLUSION

This Court has "followed the 'undeviating rule' . . . that the rights of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial." *Parker* v. *Gladden*, 385 U.S. 363. The judgment below is consistent with, indeed, demanded by, this Court's prior decisions in this regard. It should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, of Counsel for Appellee, does hereby certify that he has this date served upon Counsel for Appellant a copy of the within and foregoing Motions to Affirm and supporting brief by mailing the same, properly stamped, United States mail addressed: Attorney General, State of Georgia, Attention: Alfred L. Evans, Jr., Esquire, 132 State Judicial Building, 40 Capitol Square, Atlanta, Georgia 30334.

This 7th day of January, 1969.

.....

ROBERT B. THOMPSON